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in the

Supreme Court

of the

United States

October Term, 1974

No. 74-455

RESPONSE OF CAROLINA, INC.
AND
DATATRON CORPORATION,

Petitioners,

against

LEASCO RESPONSE, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

Petitioners, Response of Carolina, Inc. and Datatron Corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

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*Appendix contained herein.

the Fifth Circuit entered in the above styled case on July 31, 1974. Petition for rehearing and for rehearing *en banc* was filed on August 10, 1974. By order dated October 8, 1974 the Court of Appeals denied petitioners' request.

OPINIONS BELOW

The opinion of the Court of Appeals in *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314 (5th Cir. 1974) appears in Appendix D hereto. The order of the Court of Appeals denying the petition for rehearing and for rehearing *en banc* appears as Appendix E. The decisions and orders of the District Court have not been reported officially, but appear in Appendices F, G, H and I hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 31, 1974. The petition for rehearing and for rehearing *en banc* was denied on October 8, 1974, and this Petition for a Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER INJUNCTIVE RELIEF IN ANTITRUST CASES IS LIMITED TO REMEDIES PROVIDED IN 15 U.S.C. §26, OR WHETHER INJUNCTIVE RELIEF MAY ALSO ISSUE UNDER 28 U.S.C. §1651.

2. WHETHER THE FACT THAT THE PETITIONERS WILL LOSE THEIR BUSINESSES AND THUS BE UNABLE TO FINANCE THE PENDING ANTITRUST LITIGATION, MERITS A FINDING OF IRREPARABLE HARM GIVEN THE CONGRESSIONAL POLICY OF ENCOURAGING PRIVATE "ATTORNEYS-GENERAL" TO BRING ANTITRUST ACTIONS.

FEDERAL STATUTES AND FEDERAL RULE INVOLVED

Section 26 of the United States Code, Title 15 (15 U.S.C. §26), Section 1651 of the United States Code, Title 28 (28 U.S.C. §1651) and Rule 65 of the Federal Rules of Civil Procedure are printed in Appendices A, B and C to the Petition, respectively.

STATEMENT

Petitioners, Response of Carolina, Inc. (hereinafter "Response"), a North Carolina corporation, and Datatron Corporation ("Datatron"), a Kentucky corporation, are plaintiffs in two of four related actions pending in the United States District Court for the Southern District of Florida.* Petitioners sued Leasco Response, Inc. ("Leasco") alleging violations of the *Sherman* and *Clayton Acts*, conspiracy, common law deceit and breach of contract. The District Court took jurisdiction under 28 U.S.C. §1337 and ancillary and pendent jurisdiction.

Petitioners are franchisees of Leasco under a franchise agreement involving the leasing of computer equipment (hardware) and the use of certain computer programs (software). The contract required payment by petitioners to Leasco of a franchise fee, equipment rentals, and maintenance charges. In addition the franchise agreement required royalty fees equal to fifteen percent of the gross receipts for sales inside the petitioner's assigned territories and seventy percent of the gross receipts for sales outside of the assigned territories.

Petitioners, after many failures by Leasco to perform satisfactorily under the contract and after several anti-competitive activities by Leasco, ceased making rental and royalty payments. Petitioners charged that Leasco violated

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*The consolidated cases are currently set for trial in the United States District Court for the Southern District of Florida on November 4, 1974.

the antitrust laws by illegal territorial restraints implemented by the provision requiring a 70% "royalty" of sales made by a franchisee outside of its assigned territory; by preference shown to Leasco owned computer centers competing horizontally with the franchisees; by arrangements and price fixing through the imposition of minimum revenue requirements combined with territorial restrictions; and an absence of reasonably fit products for sale. Although both of the petitioners are franchisees of Leasco, the events leading to the issuance of injunctions in favor of each of the petitioners are substantially dissimilar.

One day prior to Carolina's filing of its action, Leasco brought suit in the state court of North Carolina seeking possession of the leased computer equipment and unpaid rentals. Carolina vigorously contends that the entire contract is void under the federal antitrust laws and therefore unenforceable. There being no viable antitrust defense under the laws of North Carolina to this action since the antitrust laws vest exclusive antitrust jurisdiction in the federal courts,* Carolina was unable for a want of jurisdiction in the state courts of North Carolina to litigate this antitrust defense. Moreover, Carolina could not remove the action to the United States District Court for the Western District of North Carolina since 28 U.S.C. §1441(b) prohibits removal if, as is the case here, the defendant is a citizen of the state in which the action is brought.

In addition to filing the action against Carolina, Leasco had threatened and interfered with Carolina in the

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*15 U.S.C. §15.

ordinary course of business, and, as found by the District Court, threatened Carolina's customers. Carolina moved to enjoin Leasco from further destruction of its business. The District Court found after an evidentiary hearing that unless restrained Leasco's present course of action toward and against the petitioner would substantially and irreparably damage the petitioner's business and very existence. (App. F) After so finding, the District Court enjoined Leasco from further prosecuting the state court action, from threatening or interfering with Carolina in its ordinary course of business, and from threatening or enticing Carolina's customers.

Datatron filed a petition for a temporary injunction to stop Leasco and its agents from forceably removing computer hardware from Datatron's possession in Louisville, to restrain Leasco from further disturbing and disrupting petitioner's business, and to stop Leasco's refusal to deal with Datatron. The District Court after an evidentiary hearing found that damage to the petitioner would in all likelihood be substantial and irreparable. The District Court enjoined Leasco from failing to perform any act under the contract between it and Datatron, from removing any equipment from Datatron's possession, and from harassing Datatron's employees or business operations. (App. H) At no time did Datatron seek, nor did the District Court grant, any injunction with regard to any state court action, since none had ever been filed.

Leasco appealed from the issuance of the injunctions in each case. Subsequently, upon motion by Leasco, the

District Court entered amended preliminary injunctions. (App. G, I) Leasco also filed notice from the amended preliminary injunctions.

Leasco challenged the issuance of the injunctions on appeal on the basis that the injunction had no legal basis under the antitrust laws, specifically 15 U.S.C. §26. In its opinion entered July 31, 1974 the Court of Appeals reversed the District Court, and on October 8, 1974 entered an order denying a timely petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

A. Important Federal Question

The decision of the Fifth Circuit in this case incorrectly resolved a question of federal law which has not been decided by this Honorable Court. The question presented is whether injunctive relief in antitrust cases is limited to remedies under 15 U.S.C. §26, or whether injunctive relief is also available under 28 U.S.C. §1651. Petitioners urge that the court below erred in limiting its approach only to a consideration of 15 U.S.C. §26. Petitioners respectfully suggest that this Court should decide this question due to its paramount importance to antitrust litigants.

The opinion below had the effect of holding that since the harm to petitioners arose from conduct which was not violative of antitrust laws, injunctive relief was not available. *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314 (5th Cir. 1974), at 317. In reaching this conclu-

sion, the court relied upon *Helfenbein v. International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971), *cert. den.* 404 U.S. 872 (1971). In *Helfenbein*, the Eighth Circuit stated:

> Under these circumstances this alleged 'loss' cannot be the basis of injunctive relief under 15 U.S.C.A. §26. If not authorized under §26 injunctive relief cannot otherwise issue. *Id.* at 1071.

It is this language in *Helfenbein*, forming the basis of the decision below, which petitioners urge resulted in the error now presented before this Court.

Petitioners concede that §26 is the most obvious source of authority for the issuance of injunctive relief in antitrust actions. It is also the most frequently used because the standard of "threatened loss" appears to be less demanding than the general equitable standard of substantial threat of irreparable injury. Petitioners, however, would strongly urge that in a situation such as the one at bar, the Court should not be restricted to §26 as a basis for injunctive relief.

There are four procedural requirements necessary for the issuance of an injunction. The Court must find: (1) a substantial likelihood that plaintiffs will prevail on the merits; (2) a substantial threat that plaintiffs will suffer irreparable harm if the injunction is not granted; (3) that upon balance, threatened harm to plaintiffs outweighs the injury to defendant; and (4) the injunction will provide no disservice to the public interest. *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). The District Court, using this traditional analysis, issued the

injunction. In overturning the decision, the Court of Appeals did not challenge the District Court's findings regarding the requisites for injunctive relief, but merely held that since the irreparable injury required under the general equitable principles did not arise from portions of the contract attacked as violative of antitrust laws, no injunction could stand. *Response of Carolina* at 319.

Petitioners urge that given the findings of the District Court, an injunction under 28 U.S.C. §1651 was proper. This statute, in pertinent part, provides:

> §1651. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> * * *

This "all writs" statute provides a source of injunctive relief if the above-cited criteria are met. Petitioners submit such criteria were met and that the Court of Appeals erred in failing to utilize this means of injunctive relief.

Jurisdiction in private antitrust actions promotes the policy of Congress by encouraging private citizens to pursue antitrust violations. The injunction sought in the instant case would maintain the status quo while allowing petitioners to pursue the resolution of the case without undue hardship to Leasco. Without the injunction, petitioners, as found by the District Court and not contested by Leasco

in the Court of Appeals, will be put out of business, thereby losing the means of financing what most certainly will be elongated and costly litigation. This fact was noted by the court below, but held to be irrelevant in the present case. The injunction as granted by the District Court will provide an effective means for this Court to implement the congressional policy behind the antitrust laws.

B. Conflict with Applicable Decisions of this Court

Petitioners submit that the Fifth Circuit decided the case below in a manner which conflicts with applicable decisions of this Court. The court below based its decision upon *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947), and its progeny. In doing so, the court found that the case at bar did not fall under the exception stated in *Continental Wall Paper Co., v. Lewis Voight & Sons Co.*, 212 U.S. 227 (1909). Petitioners suggest that the manner in which the lower court applied these cases is contrary to the purposes and intent evidenced in these decisions.

In *Bruce's Juices, supra,* this Court held that antitrust claims could not be raised as defenses in suits on notes representing the purchase price of goods sold and delivered. This result can be avoided only if, by enforcing the contract, the court will become a party to the carrying out of some one of the restraints forbidden by the *Sherman Act. Continental Wall Paper Co., supra,* at 261.

Petitioners submit that by applying *Bruce's Juices* to cases such as the one at bar, the Circuit Court has frustrated both the congressional purpose as well as the intent of this Court as expressed in *Bruce's Juices.* In *Bruce's*

Juices, this Court was concerned with the possibility of unjust enrichment. The plaintiff had received goods from the defendant, sold them and was attempting, by raising the antitrust defense, to avoid payment. There were two factors present in *Bruce's Juices* which warranted the result. First, in allowing the antitrust defense to prevail, the Court would have foreclosed the only opportunity the plaintiff had to litigate the debts in question. It was possible that some of the debts did not arise as a result of antitrust violations. The second factor is that the result of the Court's decision regarding the antitrust violation would merely affect the profit received by the defendant on the sale in question. There was no danger that in disallowing the antitrust defense the Court would force the defendant out of business.

In the case at bar, these factors are not present. Leasco will not lose its opportunity to litigate the alleged debts. Since the issue arose in an injunction setting, the stay of the State Court proceeding will only last until the case at bar is settled, not in perpetuity as in *Bruce's Juices*. In the pending actions, Leasco has counterclaimed for amounts equal to the claims raised in State Court. Thus, there is certain to be a judicial determination of the validity of the alleged debts.

As to the second factor, petitioners are certain to lose their business unless the injunction remains effective. The District Court issued each of the injunctions only after finding that the petitioners would be put out of business absent the injunction.

And, as petitioners have urged throughout this Petition, the destruction of their businesses will seriously handicap the continuation of this suit. Petitioners submit that since these important factors are not present in the case at bar, the application of *Bruce's Juices* was erroneous.

As further support of the position that the Fifth Circuit misapplied *Bruce's Juices,* petitioners point to the scope of the injunctions granted below. Of the five sections in the Carolina injunction decree, only two dealt with the case pending in state court on the debts. No part of the Datatron injunction dealt with a state court action for debt, as no suit had ever been filed. The Circuit Court dealt only with the portion of the injunctions which relate to the debt allegedly owed. Petitioners submit that, not only did the Circuit Court misapply *Bruce's Juices* to the debt-related portion of the injunctions, but the Court also dissolved the remainder seemingly under the same rationale. The rationale of this case was surely never intended to be applied in this manner. The restraint of Leasco from interfering with petitioners' businesses and from enticing, threatening or intimidating their customers had no effect whatever on this Court's desire to prevent "people from getting other people's property for nothing when they purport to be buying it". *Continental Wall Paper Co., supra,* at 271 (dissenting opinion).

Finally, petitioners submit that the case at bar is of the nature envisioned by the court in *Continental Wall Paper Co.* Petitioners alleged a comprehensive scheme of price fixing and tie-in arrangements. The District Court found as to each case that with reference to the antitrust

allegations, there was a reasonable probability at that stage that the petitioner would succeed on the merits of its cause. The royalties allegedly owed were challenged, contrary to the statement of the Fifth Circuit at page 320. It was this so called "royalty" fee which allowed Leasco to carry out its illegal policy. This fee, coupled with the 70% extra-territorial royalty fee, the minimum revenue requirements, and the hardware rental and maintenance charges, all form inherent elements of the illegal practice carried on by Leasco. By overlooking portions of this scheme and basing its conclusion entirely on the 70% clause, the court below failed to correctly apply the decision of this Court in *Continental Wall Paper Co.*

Petitioners submit that by applying the *Bruce's Juices* and its progeny to the situation far beyond its intended coverage, as well as by refusing to apply *Continental Wall Paper Co.*, the Fifth Circuit Court of Appeals rendered a decision in conflict with applicable decisions of this Court, as well as in conflict with the antitrust policy of this nation as expressed in its antitrust laws.

C. Conflict between Circuits

The decision of the Fifth Circuit Court of Appeals below is in direct and irreconcilable conflict with the decision and principles announced by the Seventh Circuit Court of Appeals in *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir. 1971). The facts in *Milsen* are almost identical to those in the case at bar.

In *Milsen* the franchisee sought a preliminary injunction against the termination of its franchise agreement

pending the trial of its antitrust suit against the franchisor. The Court of Appeals reversed the District Court's denial of injunctive relief. The Seventh Circuit's reasoning in *Milsen* presents the conflict petitioners here rely upon.

The primary area of conflict between the circuits is the question whether a showing by the franchisee that it will lose its business absent the injunction is a sufficient showing of irreparable harm. The court in *Milsen* relied heavily upon the fact that if the injunction was not granted, the franchisee would be put out of business and, therefore, not able to finance the litigation. *Id.* at 367. *Milsen* suggests that putting the plaintiff out of business before the legal claims are tried is a legally sufficient showing to warrant a finding of irreparable injury, giving the public interest in encouraging antitrust transactions by private parties. *Id.* at 366, 367. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 484 (1968).

The Fifth Circuit, however, refused to accept this approach. It cited with approval the result of *Helfenbein*, even though, ". . . [i]t was clear that the effect . . . was to terminate the franchisee's business." *Response of Carolina* at 320. The Fifth Circuit also noted that in order for the fact of termination to effect its decision the termination would have to be the result of the franchisee's refusal to ". . . [c]omply with practices violative of the antitrust law . . ." *Id.* at 320.

Petitioners submit that the approach in *Milsen* is correct, as it better carries out the principles set forth by Congress in the passage of §4 of the Clayton Act, 15 U.S.C. §15. The "private attorneys-general" section has had great

efficacy in enforcement of the antitrust laws of this nation. The Fifth Circuit has undermined that policy with its holding below. If a franchisee in antitrust litigation is ever to stand a chance of success as against a franchisor, the courts cannot allow its economic slaughter. Most financial arrangements between franchisor and franchisee, as in the case at bar, are so fraught with economic entanglements and obligations that it is possible for a franchisor to "legitimately" end the existence of the franchisee upon filing of a suit, thus effectively destroying the economic base from which the franchisee finances often long and expensive antitrust litigation.

Petitioners herein, as most plaintiffs in antitrust suits, are more interested in finishing this litigation with an extant business than in collecting a large judgment after these businesses and reputations have been destroyed. Petitioners respectfully submit that this conflict between the circuits is of great importance and should be resolved by this Honorable Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was served upon the attorneys of record for Respondent, FOWLER, WHITE, HUMKEY, BURNETT, HURLEY & BANICK, P.A., Fifth Floor, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 18th day of October, 1974.

BY: /s/ Jos. W. Womack
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